

## REMARKS

Claims 1, 2, and 5-68 were pending in the current application. Applicants have amended claims 6, 28-31, 39, 61, 63, 67, and 68. Reexamination and reconsideration of all pending claims, as amended, are respectfully requested.

Applicants acknowledge and appreciate the indication of allowability for claims 14-23, 54, and 55 of the present application.

### **35 U.S.C. §103**

Independent claims 1, 5, 6, 28-32, 39, 40, 44, 45, 56, 57, 59, 61, 63, 64, and 66-68 are pending in the application.

The Office Action rejected claims 1 and 2, including independent claim 1, under 35 U.S.C. §103 based on Malmivirta et al., U.S. Patent 6,680,913 (“Malmivirta”) in view of Walding, U.S. Patent 6,031,845 (“Walding”). The Office Action rejected claims 32 and 33, including independent claim 32, under 35 U.S.C. §103 based on Malmivirta in view of Walding and in further view of Gillespie, U.S. Patent 6,014,377 (“Gillespie”), and dependent claim 34 under 35 U.S.C. §103 based on Malmivirta in view of Walding and in further view of Gillespie and in still further view of Gopalakrishnan et al., U.S. Patent 7,110,466 (“Gopalakrishnan”). The Office Action rejected dependent claims 35-38 under 35 U.S.C. §103 based on Malmivirta in view of Walding in further view of Gillespie and in still further view of Numminen et al., U.S. Patent 6,687,499 (“Numminen”), and independent claim 5 under 35 U.S.C. §103 based on Malmivirta in view of Walding and in further view of Funk, U.S. Patent 6,766,164 (“Funk”).

The Office Action rejected claims 6-8, 10-13, and 24-28, including independent claims 6 and 28, under 35 U.S.C. §103 based on Malmivirta in view of Mawhinney et al., U.S. Patent 5,898,674 (“Mawhinney”) in further view of Brady, U.S. Patent 3,922,508 (“Brady”). The Office Action further rejected independent claims 29-31 and 39 under 35 U.S.C. §103 based on Malmivirta in view of Mawhinney, in further view of Brady, and in

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still further view of Engbersen, U.S. Patent 5,271,000 (“Engbersen”). The Office Action also rejected dependent claim 9 under 35 U.S.C. §103 based on Malmivirta in view of Mawhinney in further view of Brady and in still further view of Funk. The Office Action rejected claims 40-44, including independent claims 40-44, under 35 U.S.C. §103 based on Malmivirta in view of Numminen in further view of Oommen, U.S. Patent 6,799,203 (“Oommen”) and in still further view of Tiedemann Jr. et al., U.S. Patent 5,802,105 (“Tiedemann”), and independent claims 45 and 56 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann. The Office Action rejected dependent claim 49 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann and in further view of Kobayashi, Numminen, and dependent claims 50-53 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann and in further view of Kobayashi, U.S. Patent 6,333,932 (“Kobayashi”).

The Office Action rejected dependent claims 46-48 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann and in further view of Ikeda, U.S. patent 5,636,212 (“Ikeda”), and claims 57 and 58, including independent claim 57, under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann and in further view of Kobayashi and in further view of Ikeda and in even further view of Sjoblom, U.S. Patent Publication 2002/0009053 (“Sjoblom”). The Office Action rejected independent claim 59 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann, and dependent claim 60 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann and in further view of Engbersen. Claims 61-63, 65, 67, and 68, including independent claims 61, 63, 67, and 68 were rejected under 35 U.S.C. §103 based on Malmivirta in view of Kobayashi in further view of Sjoblom and in still further view of Brady, and independent claims 64 and 66 under 35 U.S.C. §103 based on Malmivirta in view of Tiedemann in further view of Kobayashi in still further view of Ikeda and in even further view of Sjoblom.

Applicants initially note that certain pending claims have been rejected on the basis of as many as five separate references. Applicants submit that rejection of any claim based on as many as five separate references demonstrates hindsight reconstruction of the invention, which is improper. “A factfinder should be aware, of course, of the distortion

caused by hindsight bias and must be cautious of arguments reliant upon ex post reasoning.” *KSR International Co. v. Teleflex Inc.*, No. 04-1350, 550 U.S. \_\_\_\_ (2007). Applicants submit that the present Office Action relies extensively on ex post reasoning, which is improper.

Applicants appreciate that several of the groupings and rejections above were made based on a review of the references and a correlation with the pending claims. However, Applicants believe it makes sense under these circumstances to address the rejections of the independent claims by grouping certain arguments together.

*Independent Claims 1, 5, and 32*

Applicants point to the limitation of “configuring the one or more channels based on the selected tests settings in the first message...” in claim 1 (similar limitations are present in independent claims 5 and 32 (“configuring each auxiliary channel based on test settings applicable to the auxiliary channel”)). This limitation in claim 1 is addressed in the middle of p. 4 of the Office Action, wherein it is listed with several limitations, followed by the citation to “column 7 lines 40-45, columns 7-8 lines 58-8 [of Malmivirta]”; *see also*, claim 32 rejection, Office Action, pp. 8-9.

A similar limitation is presented in claim 5 (“configure the one or more channels based on the test settings in the first message”), but this limitation is not addressed in the rejection of claim 5 at p. 16 of the Office Action. Applicants object to the failure of the Office Action to address the specific limitation recited, but nevertheless note that the limitation, as with claim 1, is entirely missing from Malmivirta.

Applicants dispute that configuring one or more channels based on test settings, such as selected test settings, is shown in Malmivirta, either in the cited passage or elsewhere.

Regarding the cited col. 7 and 8 passages, these passages say:

As soon as the G loop has been closed the test equipment can start sending test data. Testing is preferably carried out such that the test equipment generates test bursts in which the information bits contain desired "raw data", i.e. bit combinations the reception of which is to be examined. Functionally, data transmission and reception occur on the physical protocol level called Layer 1....

When the G loop is closed the mobile station loops in principle the information bits of every burst received on the downlink data channel back to a certain uplink burst. It is here assumed bursty transmission. The same principle can easily be generalized to apply to a situation in which the transmission is continuous; this concerns especially the testing of mobile stations in systems utilizing the code division multiple access (CDMA) method. In the exemplary GSM system each burst has 114 information bits to loop back, excluding the so-called stealing flags. Preferably the loopback does not depend on the contents of the so-called midamble of the received downlink bursts. In uplink bursts the mobile station uses the midamble that it would use anyway.

The test equipment receives the uplink bursts sent by the mobile station and demodulates and decrypts them so that the information bits in a received burst can be processed by the test equipment....

These passages say nothing about configuring channels based on test settings. Test bursts are transmitted, and loopback does not depend on contents of the "midamble" of received downlink bursts. Nowhere in this passage, or anywhere in Malmivirta, is the concept of configuring channels based on test settings in a message. Applicants therefore submit that claims 1, 5, and 32 are not obvious in view of the cited references, alone or in combination, as they are missing a limitation included in claims 1, 5, and 32.

*Independent Claims 6 and 28*

Applicants focus on the “observation interval” limitations of, for example, claim 6, including “receiving a first data transmission comprising test packets of known test data via a first channel *during an observation interval*; identifying parameter values *descriptive of the test packets received in the first data transmission during the observation interval*, ... forming a second data transmission comprising the identified parameter values *for all packets received during the observation interval*;...” Applicants have amended claim 6 to recite “forming a second data transmission comprising the identified parameter values *for all test packets received during the observation interval*.” Applicants have similarly amended claim 28.

By way of background, Applicants point to the fact that the present Specification discusses FTAP Test Packets, formed using the fields of Table 7, and the formation of FTAP Loop-Back Packets, which differ from the FTAP Test Packets and are formed including the fields shown in FIG. 8. The FTAP Loop-Back Packets include information about all (potentially multiple) FTAP Test Packets received during the observation interval. Thus, for example, a test packet is not transmitted according to the present design and subsequently sent back verbatim, i.e. in the exact form received, during loop back processing.

But this verbatim transmission is precisely what occurs in Mawhinney. Mawhinney sends back what it receives: *see, e.g. Mawhinney, col. 11, l. 67 through col. 12, l. 2* (“When loopback is active on a virtual circuit, all frames received on the diagnostic channel of the circuit are transmitted back to the originating device...”) Further, the Brady design shows an interval during which loopback testing occurs, with a switch turned on at the beginning of the interval and turned off at the end of the interval: “Relay 48 includes a timer built therein which holds the relay in the loopback position for a predetermined period of time during which suitable loopback tests may be performed.” This has nothing to do with the limitations claimed of first data transmission being received, parameters extracted, and a

second transmission being formed including identified parameter values for “all” test packets received during an observation interval. In short, neither Mawhinney nor Brady, alone or in combination, show the formation and transmission of a second transmission as claimed.

As none of the cited references, alone or in combination, show, for example, a second transmission formed including identified parameter values for “all” test packets received during an observation interval, claim 6, as amended, is not obvious in view of the cited references, alone or in combination. Claim 28 is also not obvious for the same reasons. All claims depending from allowable claims 6 and 28 are allowable as they include limitations not found in the cited references.

*Independent Claims 29-31 and 39*

Claims 29-31 and 39 were rejected for similar reasons as claims 6 and 28, but the Office Action also relies on Engbersen, but for the aspect of “source address being part of the test packet” (Office Action, p. 34) in rejecting these claims.

Applicants have amended these claims, including, for example, claim 29 to recite “forming a plurality of loop back packets for the plurality of received test packets, wherein each loop back packet covers zero or more test packets, and includes the transmission source and the sequence number of [[any]] every covered test packet received during the observation interval.” Similar amendments have been made to claims 30, 31, and 39.

Formation of loop back packets “wherein each loop back packet ... includes the transmission source and the sequence number of every covered test packet received during the observation interval” is not shown by Mawhinney and/or Brady, alone or in combination. These references either send received packets back verbatim (Mawhinney) or provide a time period where loop back occurs, irrespective of a relationship between the time period and test packets. Thus the amended claim 29 is not obvious based on the cited references, alone or in combination. The same can be said of claims 30, 31, and 39. Claims

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depending from these claims are also allowable as they include limitations not shown by the cited references, alone or in combination.

*Independent Claims 61, 63, 67, and 68*

As with claims 29-31 and 39 above, these claims have been amended to read “includes a transmission source and a sequence number of [[any]] every covered test packet received during the observation interval” (claim 68, with similar limitations in the other cited claims). Such limitations are neither disclosed nor suggested by the combination of Malmivirta, Kobayashi, Sjoblom, and/or Brady.

The Office Action is somewhat unclear as to precisely which reference the foregoing limitation (or similar limitations in other claims) is being employed in the rejection. At p. 62 of the Office Action, the Office Action acknowledges that Malmivirta “does not explicitly tech....includ[ing] the transmission source of each covered test packet [received during the observation interval]...” but then cites Kobayashi, Sjoblom, and Brady, without explicitly correlating these references to the claim language. In short, as discussed above and as is true for these cited references, none of these references, alone or in combinations, show these “observation interval” limitations, nor the limitation of, for example, “means for processing a plurality of loop back packets received via a reverse traffic channel, wherein *each loop back packet covers zero or more test packets received during an observation interval, and includes a transmission source and a sequence number of [[any]] every covered test packet received during the observation interval*”.

All of these pending independent claims include limitations similar to the foregoing “observation interval” language, and Applicants submit that claims 61, 63, 67, and 68, as amended, are not obvious based on the cited references, alone or in combination.

*Independent Claims 40 and 44*

Claims 40 and 44 recite “collect[ing] a first statistic for a first parameter while in an idle state and not exchanging data via the link, wherein collecting the first statistic occurs

while performing a testing function; collect[ing] a second statistic for a second parameter different from the first parameter while in a connected state and exchanging data via the link.” Collecting the first statistic thus occurs, in both claims 40 and 44, while in the idle state.

The Office Action cites Numminen, col. 10, ll. 1-8 which generally describes an idle mode. Office Action, p. 40. In the Numminen idle mode, “it [mobile station or terminal] receives from base stations certain downlink messages and sends occasionally location update messages uplink.” *Id.* This describes idle mode operation **wherein testing is not being performed, nor collecting statistics.** Collecting of statistics does not occur in idle mode within Numminen, and is not shown by the cited passage.

The Office Action seeks to address this deficiency by surmising “it [the mobile station or terminal] is for most of the time in the so-called idle mode (i.e. idle state) in which it receives from base stations certain downlink messages...” Office Action, p. 41. The claim language, however, is “**collect[ing] a first statistic for a first parameter while in an idle state and not exchanging data via the link, wherein collecting the first statistic occurs while performing a testing function...**” The Numminen design is simply in idle mode and receives downlink messages and occasionally sends location update messages – it does not, as expressly claimed, collect a first statistic for a first parameter and not exchange data via the link nor collect the first statistic while performing a testing function. The Office Action is seeking to embellish, in some manner, Numminen’s idle state functionality in a manner clearly contrary to the express language of the reference.

The Office Action finds the limitation of collecting the first statistic while performing testing in Tiedemann, said to exist at col. 14, ll. 40-57. (Office Action, p. 43). This strained reading of Tiedemann in combination with Numminen in actuality shows nothing similar to “collecting a first statistic for a first parameter while in an idle state and not exchanging data via the link, wherein collecting the first statistic occurs while performing testing...” This limitation requires collecting a first statistic for a first parameter



while performing testing in an idle state and not exchanging data via the link. The Numminen reference fails to collect statistics or collect statistics while in an idle state or operate in an idle state while performing testing. The cited Tiedemann paragraph speaks of detecting CRC errors during testing but says nothing about an idle state. In reality, the combination of these references, while only marginally employing wording having some broad, general similarity to the language employed in the claim, does not show “collecting a first statistic for a first parameter while in an idle state and not exchanging data via the link, wherein collecting the first statistic occurs while performing testing...” These references have nothing to do with each other in this respect and cannot be said to show the claimed limitation, alone or in combination. In other words, the combination of Numminen and Tiedemann does not show “collecting a first statistic for a first parameter while in an idle state and not exchanging data via the link, wherein collecting the first statistic occurs while performing testing”.

Neither the Oommen reference nor the Malmivirta design is cited in opposition to this “collecting a first statistic” limitation, and thus the combination of Malmivirta, Numminen, Oommen and Tiedemann does not render claims 40 or 44 obvious, as the claims include limitations not shown by the cited combination. Claims depending from allowable claims 40 and 44 are allowable as they include limitations not shown by the combination of Malmivirta, Numminen, Oommen and Tiedemann.

*Independent Claims 45, 56, and 59*

With respect to claim 45, Applicants focus on the following limitation:

forming a plurality of test packets for transmission on the traffic channel, the plurality of test packets comprising information for a plurality of rates being tested for the traffic channel;

This “forming” limitation, and particularly the “plurality of test packets comprising information for a plurality of rates being tested for the traffic channel” is purportedly shown

by Tiedemann, including the disclosure of Table II and certain associated text therein (Col. 9, ll. 30-33). Table II lists various rates and test bits per frame. This does not show a “plurality of test packets comprising information for a plurality of rates being tested for the reverse traffic channel.” While the Tiedemann listing of rates represents “test bits per frame,” it is not information contained in a plurality of test packets. The “test bits per frame” in Tiedemann specifically is not included in the Tiedemann test packets; rather, it is the bits per frame at which the Tiedemann data packets are transmitted. The claim requires a container (test packets) comprising information for multiple metrics (rates being tested), while Tiedemann shows multiple metrics. These are two different concepts, and again, the Tiedemann test packets do not include this information.

The Office Action does not rely on Malmivirta for this limitation, as it does not. Thus claim 45 is not obvious in view of the combination of Malmivirta and Tiedemann. Claims depending from claim 45 are not obvious as they include limitations not found in the cited references, alone or in combination.

Claim 56 includes a limitation similar to the “forming” limitation of claim 45:

form a plurality of test packets for transmission on the traffic channel, the plurality of test packets comprising information for a plurality of rates being tested for the traffic channel;

As noted with respect to claim 45, “test packets comprising information for a plurality of rates being tested for the traffic channel” are not shown by Tiedemann, nor by the combination of Malmivirta and Tiedemann. For the reasons presented above, claim 56 is not obvious in view of the combination of Malmivirta and Tiedemann.

Claim 59, and specifically the limitation of:

receiving a plurality of test packets at a plurality of rates on the reverse traffic channel, the plurality of test packets comprising information for a plurality of rates being tested for the reverse traffic channel;

was rejected based on Malmivirta in view of Tiedemann, where the Office Action acknowledges Malmivirta shows neither receiving a plurality of test packets at a plurality of rates nor the plurality of test packets comprising information for a plurality of rates being tested, or updating a plurality of variables maintained for a plurality of rates based on the rates of the received test packets. Office Action, p. 57.

These limitations are found by the Office Action in Tiedemann, and the Office Action relies on the Abstract and col. 9, ll. 30-33 and Table II of Tiedemann. The Abstract of Tiedemann says that each data packet is assigned one of a multiplicity of data rates in accordance with a first pseudorandom process, and is transmitted at the data rate assigned thereto. This is not “the plurality of test packets comprising information for a plurality of rates being tested for the reverse traffic channel.” This passage of the Tiedemann Abstract states that packets are transmitted at a certain rate, while the claim requires that the test packets “compris[c] information” for a plurality of rates being tested. These are different – to analogize, the claim is similar to a claim for a car carrying a list of metrics, such as speed at which the car can operate, versus the reference showing that the car operates at certain metrics, such as at certain speeds or a specific speed. It is the metric itself versus a carrier containing information about the metric. These are two different things.

The passage at Col. 9, ll. 30-33 and Table II do not contradict the foregoing. Table II lists various rates and test bits per frame. This is not “the plurality of test packets comprising information for a plurality of rates being tested for the reverse traffic channel.” While this is a list of test bits per frame, it is not information contained in a plurality of test packets, and the information provided is not included in the Tiedemann test packets; rather, it is the bits per frame that the Tiedemann data packets are transmitted.

Malmivirta also does not show this limitation. Claim 59 is therefore not obvious based on Malmivirta in view of Tiedemann.

*Independent Claims 57, 64, and 66*

Claim 57 includes two limitations, similar to those discussed above, that materially differ from the cited references:

receiving a first message having included therein a minimum rate and a maximum rate for data transmission on the reverse traffic channel; [the “receiving” limitation]

forming a plurality of test packets for transmission on the reverse traffic channel, wherein each test packet includes a sequence number of a test packet last transmitted at each of a plurality of possible rates; [the “forming” limitation]

The “forming” limitation, and the “each packet includes a sequence number” is said in the Office Action to be shown by Kobayashi. Office Action, p. 53.

FIG. 783 of Kobayashi had been previously identified as showing the claimed feature. This Office Action now abandons FIG. 783, and now finds the claimed feature elsewhere in the over 1000 page Kobayashi reference. The Office Action at pp. 53-54 apparently includes language cut and pasted from Kobayashi. **However, this language in the Office Action has nothing to do with the claimed limitation.**

The claimed “forming” limitation is “forming a plurality of test packets for transmission on the reverse traffic channel, wherein each test packet includes a sequence number of a test packet last transmitted at each of a plurality of possible rates.” The Kobayashi col. 2, col. 3, col. 97, and FIGs. 582-628 do not show such a design, i.e. one where each test packet includes a number of a test packet transmitted at each of a plurality of possible rates. The Office Action simply states that a Kobayashi discloses “protocol type, packet type, number of records field, time interval, source address, sequence number in the packets shown...” but none of these is “a sequence number of a test packet last transmitted at each of a plurality of possible rates.” While Applicants acknowledge that Kobayashi does

indeed provide a great deal of information, and much information is contained in the numerous packets and constructions provided in Kobayashi, none of the cited references, Figures, or passages of Kobayashi show “a sequence number of a test packet last transmitted at each of a plurality of possible rates”.

Applicants submit that this limitation remains missing from Kobayashi, and is not present in any of the other cited references.

The passage cited in the Office Action, Col. 2, ll. 55-67 of Kobayashi, merely talks about a destination address (DA) and a source address (SA) as the only pertinent information required in testing the wired network.

Thus claim 57 is not obvious based on Malmivirta, Tiedemann, Kobayashi, Ikeda, and Sjoblom, alone or in combination.

With respect to the “receiving” limitation, this requires a first message being received that includes a minimum and maximum rate for data transmission on the reverse traffic channel. It is not clear where this limitation is purportedly shown. However, Applicants note that, as discussed above, the Tiedemann reference fails to show receipt of a first message that includes a minimum and maximum rate for data transmission on the reverse traffic channel. Tiedemann, while presenting various rates in Table II and the associated text, does not provide rates, particularly maximum and minimum transmission rates for data transmission on the reverse channel, in a test message. Thus the receiving limitation of claim 57 is not shown by any of the cited references, alone or in combination.

Applicants therefore submit that with respect to claim 57, the claim is not obvious based on Malmivirta, Tiedemann, Kobayashi, Ikeda, and/or Sjoblom, alone or in combination. Claim 58, depending from claim 57, is allowable as it includes limitations not found in the cited references.

*Independent Claims 64 and 66*

Independent claims 64 and 66 include limitations similar to the “receiving” and forming” limitations of claim 57:

*a receive data processor operative to receive a first message having included therein a minimum rate and a maximum rate for data transmission on a reverse traffic channel;*

*a controller operative to form a plurality of test packets for transmission on the reverse traffic channel, wherein each test packet includes a sequence number of a test packet last transmitted at each of a plurality of possible rates, ...*

(Claim 64, emphasis added)

*means for receiving a first message having included therein a minimum rate and a maximum rate for data transmission on a reverse traffic channel;*

*means for forming a plurality of test packets for transmission on the reverse traffic channel, wherein each test packet includes a sequence number of a test packet last transmitted at each of a plurality of possible rates;*

(Claim 66, emphasis added)

As discussed above with respect to claim 57, the “sequence” limitations related to each “test packet” are not shown in Kobayashi, and the “a minimum rate and a maximum rate” are not shown by Tiedemann, nor any of the other cited references, alone or in combination. Thus claims 64 and 66 are not obvious in view of the combination of cited references, and claims depending from these references are also not obvious as they include limitations not shown in the cited references.

### Combination of References

The combination of up to five separate disparate references, combined with stretching the references to appear similar to the claim language when in fact they are not, demonstrate ex post or hindsight reasoning in rejecting the present claims.

Applicants disagree that one of ordinary skill in the art would have a reason to combine the features disclosed in the references presented, but particularly the most numerous references provided (Malmivirta, Mawhinney, Tiedemann, Wilding, Gillespie, Kobayashi, etc.) Applicants submit that the combination of as many as five separate and distinct references is unreasonable, and in many cases the three references combined is also unreasonable, and such combinations demonstrate ex post or hindsight reasoning in an attempt to piece together the claimed invention. Disparate inapposite portions of the cited references are simply pulled out of thin air and combined with other disparate references in an attempt to deprecate the claimed invention, which is improper.

The PTO has the burden of establishing a prima facie case of obviousness under 35 USC §103. The Patent Office must show that some reason to combine the elements with some rational underpinning that would lead an individual of ordinary skill in the art to combine the relevant teachings of the references. *KSR International Co. v. Teleflex Inc.*, No. 04-1350, 550 U.S. \_\_\_\_ (2007); *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). Therefore, a combination of relevant teachings alone is insufficient grounds to establish obviousness, absent some reason for one of ordinary skill in the art to do so. *Fine* at 1075. In this case, the Examiner has not pointed to any cogent, supportable reason that would lead an artisan of ordinary skill in the art to come up with the claimed invention.

None of the cited references, alone or in combination, teaches the unique features called for in the claims. It is impermissible hindsight reasoning to pick a feature here and there from among the references to construct a hypothetical combination which obviates the claims.

It is impermissible, however, simply to engage in a hindsight reconstruction of the claimed invention, using the applicant's structure as a template and selecting elements from references to fill the gaps. [citation omitted]

*In re Gordon*, 18 USPQ.2d 1885, 1888 (Fed. Cir. 1991). As previously noted, distortion occurs using hindsight reasoning and ex post reasoning is disapproved. *KSR International Co. v. Teleflex Inc.*, No. 04-1350, 550 U.S. \_\_\_\_ (2007).

A large number of devices may exist in the prior art where, if the prior art be disregarded as to its content, purpose, mode of operation and general context, the several elements claimed by the Applicant, if taken individually, may be disclosed. However, the important thing to recognize is that the reason for combining these elements in any way to meet Applicant's claims only becomes obvious, if at all, when considered from hindsight in the light of the application disclosure. The Federal Circuit has stressed that the "decisionmaker must step backward in time and into the shoes worn by a person having ordinary skill in the art when the invention was unknown and just before it was made." *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1566 (Fed. Cir. 1987). To do otherwise would be to apply hindsight reconstruction, which has been strongly discouraged by the Federal Circuit. *Id.* at 1568.

To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.

*W.L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540, 1553 (Fed. Cir. 1983). Therefore, without some reason in the references to combine the cited prior art teachings, with some rational underpinnings for such a reason, the Examiner's conclusory statements in support of the alleged combination fail to establish a prima facie case for obviousness. See, *KSR International Co. v. Teleflex Inc.*, No. 04-1350, 550 U.S. \_\_\_\_ (2007) (obviousness determination requires looking at "whether there was an apparent reason to combine the known elements in the fashion claimed...", citing *In re Kahn*, 441 F.3d 977,



988 (CA Fed. 2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness,” KSR at 14).

Several reasons supporting the combination of references are provided in the present Office Action, but most if not all are merely conclusions used to justify choosing references based on aspects presented in the claims, or broad generalizations of desirable performance for any device or method in this field of technology. For example, the justification for combining Malmvirta with Tiedemann is said to be “by testing communication link at various data rates a node can get an accurate picture of the current condition of the link; thus enabling it to modify, most efficiently and reliably, link parameters related to rates to enable seamless communication...” Office Action, pp. 45-46. This is nothing more than a vague, general statement of operation desirable in virtually any communication system. It is always beneficial to improve operation, cost, efficiency, and so forth, but the question is what reasoning would have been used by one to take the teachings of, say, Tiedemann and modify them in a manner consistent with Malmvirta, Numminen, or Walding, among others, in the manner suggested. Here, no such reason has been articulated. Conclusory reasoning such as that presented is improper hindsight reconstruction of the invention, and for this further reason, all pending claims are allowable over the cited references.

Applicants have, by the foregoing, addressed all pending independent claims. All dependent claims include limitations not found in the cited references, alone or in combination, and are therefore not obvious in view of the cited references.

Accordingly, it is respectfully submitted that all pending claims fully comply with 35 U.S.C. § 103.

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### CONCLUSION

In view of the foregoing, it is respectfully submitted that all claims of the present application are in condition for allowance. Reexamination and reconsideration of all of the claims are respectfully requested and allowance of all the claims at an early date is solicited.

It is believed that all of the pending claims have been addressed. However, the absence of a reply to a specific rejection, issue or comment does not signify agreement with or concession of that rejection, issue or comment. In addition, because the arguments made above may not be exhaustive, there may be reasons for patentability of any or all pending claims (or other claims) that have not been expressed. Finally, nothing in this paper should be construed as an intent to concede any issue with regard to any claim, except as specifically stated in this paper, and the amendment of any claim does not necessarily signify concession of unpatentability of the claim prior to its amendment.

Applicants believe that no fees are due in accordance with this Response beyond those included herewith. Should any fees be due, the Commissioner is hereby authorized to charge any deficiencies or credit any overpayment to Deposit Account No. 17-0026.

Respectfully submitted,

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